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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, *et al.*,

Appellants,

v.

ROTARY CLUB OF DUARTE, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

**BRIEF AMICUS CURIAE OF THE ANTI-DEFAMATION
LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLEES**

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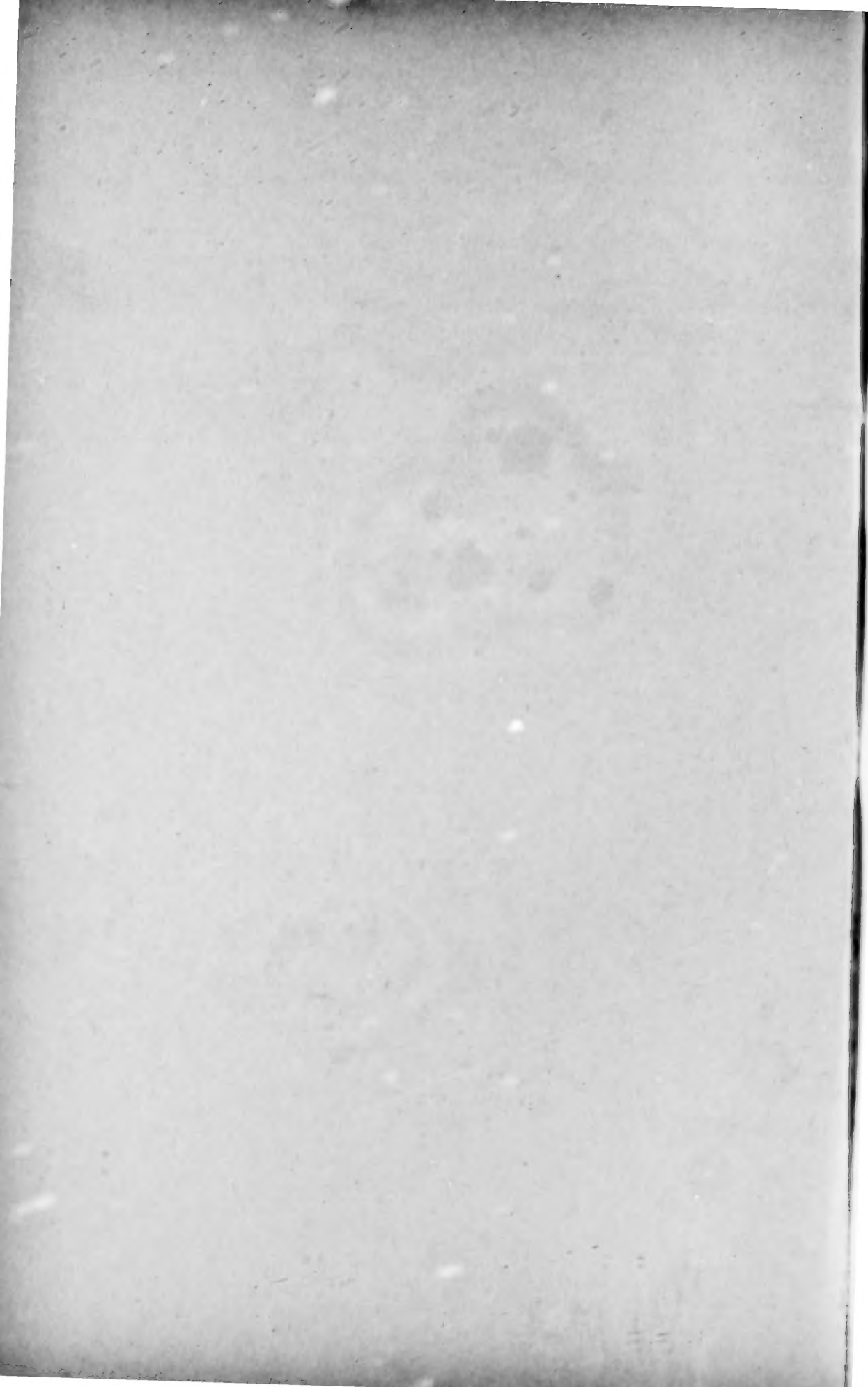
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QUESTIONS PRESENTED

1. As business establishments subject to the requirements of §51 of California's Unruh Civil Rights Act, are Rotary International and the Rotary Club of Duarte prohibited from withholding full and equal accommodations, facilities, privileges and services on the basis of sex?

2. Does the application of §51 of the Unruh Act to Rotary International infringe upon its first amendment freedom of intimate and expressive association even though it is a large business enterprise with unselective membership criteria?

3. Is §51 of the Unruh Act vague and overbroad?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
CONSENT OF THE PARTIES	1
INTEREST OF THE <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Rotary International And The Rotary Club Of Duarte Are Business Establishments Within The Meaning Of California's Unruh Civil Rights Act, And Are There- fore Prohibited From Discriminating On The Basis Of Sex	4
A. In Determining Whether Rotary International And The Rotary Club Of Duarte Are Business Estab- lishments Under California Law, This Court Is Bound By The Relevant Rulings Of California Courts	4
B. The Evidence Supports The Lower Court's Finding That International And Duarte Are Business Establishments Under California Law	5
C. As A Business Establishment In California, Duarte Was Obligated To Open Its Doors To Women	7
II. International's First Amendment Associational Rights Were Not Abridged By The Striking Down Of International's Male-Only Membership Policy Pursuant To California's Unruh Civil Rights Act	7
A. The Attributes Of International And Duarte Render Them Business Establishments With Limited Rights Of Freedom Of Intimate Association	8
B. The State Of California's Interest In Eradicating Discrimination Is A Compelling One Which Outweighs International's Freedom Of Expressive Association .	13
III. The Unruh Act Is Neither Vague Nor Overbroad And Its Constitutionality Should Be Affirmed	15
A. Vagueness	15
B. Overbreadth	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	PAGE
<i>Bob Jones University v. United States</i> , 461 U.S. 574 (1983) . . .	2
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	16
<i>Brockett v. Spokane Arcades, Inc.</i> , 472 U.S. 609 (1984)	4, 16
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954)	2
<i>Burks v. Poppy Construction Co.</i> , 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962)	5
<i>Connally v. General Construction Co.</i> , 269 U.S. 385 (1925) . . .	15
<i>Curran v. Mount Diablo Council of Boy Scouts</i> , 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (Cal. App. 2 Dist. 1983)	5, 12
<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1980)	2
<i>Hishon v. King & Spalding</i> , 467 U.S. 69 (1984)	2, 12
<i>Isbister v. Boys' Club of Santa Cruz, Inc.</i> , 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985)	5, 6
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968)	2
<i>Koire v. Metro Car Wash</i> , 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985)	13
<i>Local No. 93, International Association of Firefighters v. City of Cleveland, AFL-CIO C.L.C.</i> , — U.S. —, 106 S. Ct. 3063 (1986)	2
<i>McDonald v. Santa Fe Trail Transportation Co.</i> , 427 U.S. 273 (1976)	2
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	9
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	16
<i>Norwood v. Harrison</i> , 413 U.S. 455 (1970)	12
<i>O'Connor v. Village Green Owners Ass'n</i> , 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983)	5
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	9
<i>Pines v. Tomson</i> , 160 Cal. App. 3d 370, 206 Cal. Rptr. 866, as modified, 160 Cal. App. 3d 1086(b) (Cal. App. 2 Dist. 1984)	2, 8, 13
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978)	2
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	passim
<i>Rotary Club of Duarte v. Board of Directors of Rotary International</i> , 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (Cal. App. 2 Dist. 1986)	passim
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976)	2
<i>San Antonio Indep. School District v. Rodriguez</i> , 411 U.S. 1 (1973)	2
<i>Shelley v. Kraemer</i> , 334 U.S. 1 (1948)	1

	PAGE
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S. 229 (1969)	2
<i>United States Power Squadrons v. State Human Rights Appeal Board</i> , 59 N.Y.2d 401, 465 N.Y.S.2d 871 (1983)	12
STATUTES	
Cal. Civ. Code §51 (West 1959)	<i>passim</i>
OTHER AUTHORITIES	
34 Ops. Cal. Atty. Gen. 230 (1959)	5
Kanowitz, <i>Women and the Law</i> (1969)	14

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CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

For over seventy years, the Anti-Defamation League of B'nai B'rith has pursued the objective set out in its charter "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." Among its activities directed to these ends, the Anti-Defamation League has fought steadfastly to remove those discriminatory barriers which have prevented individuals from fully enjoying their rights as guaranteed by the Constitution. The League has filed *amicus* briefs in the areas of housing, employment, and education in such cases as *Shelley v. Kraemer*, 334 U.S. 1

(1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1 (1973); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); and *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C., v. City of Cleveland*, ___ U.S. ___, 106 S. Ct. 3063 (1986).

Additionally, the League was a party in *Pines v. Tomson*, 160 Cal. App. 3d 370, 206 Cal. Rptr. 866, *as modified*, 160 Cal. App. 3d 1086(b) (Cal. App. 2 Dist. 1984), where similar issues regarding the applicability and constitutionality of §51 of the California Unruh Civil Rights Act were raised. In the context of religious discrimination, the League argued that the term "business establishment" encompassed the publishers of a discriminatory business directory and that application of the statute to the publishers did not violate their rights of freedom of association.

Combatting gender discrimination under the Unruh Act is no less compelling. As more women enter the work force, discriminatory policies based on stereotypical notions designed to bar women from entering into and advancing in the business world will be challenged. The Court is presented with the opportunity to uphold the ruling of the California courts in removing one of the many obstacles faced by women and minorities on their road to equality. Since the League is able to bring to the issues before the Court the perspective of a national human rights organization dedicated to the safeguarding of all persons' civil rights, it respectfully offers this Court its accumulated expertise with the issues raised by this case.

STATEMENT OF THE CASE

Amicus incorporates the statement of the case as set forth in the Brief for Appellees.

SUMMARY OF ARGUMENT

This case raises the question of whether an organization termed a "business establishment" under California's Unruh Civil Rights Act, Cal. Civ. Code §51 (West 1959) (the "Unruh Act"), can discriminate on the basis of sex. The Unruh Act flatly prohibits such discrimination, and appellants' first amendment associational rights do not outweigh that prohibition.

The California Court of Appeal, interpreting California law, has held that Rotary International ("International") and the Rotary Club of Duarte ("Duarte") display considerable "businesslike attributes" and are therefore business establishments under the terms of the Unruh Act. *Rotary Club of Duarte v. Board of Directors of Rotary International*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213 (Cal. App. 2 Dist. 1986). That holding stands as a matter of state law, because the California Supreme Court denied International's petition for review. Appellants' Jurisdictional Statement, Appendix at D-1. As business establishments, International and Duarte must afford women "full and equal accommodations, facilities, privileges, and services," including the privilege of membership. Cal. Civ. Code §51.

Appellants' argument that the admission of women would violate their constitutional freedom of intimate and expressive association is without merit. Three years ago, this Court explicitly rejected the same contention in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), a case which is directly on point and dictates the outcome here.

The *Roberts* Court found the Jaycees, an organization of 7,400 local chapters and approximately 295,000 members, clearly "outside of the category of relationships" worthy of the Constitution's protection of intimate association. *Roberts*, 468 U.S. at 620. Rotary International, which comprises a global federation of more than 19,000 clubs with a membership close to one million, is hardly more intimate than the Jaycees. Indeed, in its "size, purpose, policies, selectivity, [and] congeniality," the factors considered relevant by this Court, International is virtually indistinguishable from the Jaycees. *Roberts*, 468 U.S. at 620.

Regarding International's freedom of expressive association, the compelling state interest served by the Unruh Act's prohibition of discrimination on the basis of sex unquestionably justifies any lim-

ited infringement. As in *Roberts*, the compelling interest is unrelated to the suppression of ideas, and cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts*, 468 U.S. at 623.

Appellants' challenge to the Unruh Act as vague and overbroad must also fail. The Act is neither vague nor overbroad; its meaning and application are unmistakable, and its sweep is plainly legitimate. The Unruh Act is constitutional on its face and as applied, and therefore International and Duarte must abide by its provisions.

ARGUMENT

I. Rotary International And The Rotary Club of Duarte Are Business Establishments Within The Meaning Of California's Unruh Civil Rights Act, And Are Therefore Prohibited From Discriminating On The Basis Of Sex.

California's Unruh Civil Rights Act, Cal. Civ. Code §51 (West 1959) (the "Unruh Act"), prohibits business establishments from discriminating on the basis of sex. The Unruh Act, which governs this case, specifically provides that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Emphasis added.)

A. In Determining Whether Rotary International And The Rotary Club Of Duarte Are Business Establishments Under California Law, This Court Is Bound By The Relevant Rulings Of California Courts.

This Court has consistently recognized that "state courts provide the authoritative adjudication of questions of state law." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, ___, 105 S. Ct. 2794, 2804 (1985), O'Connor, J., concurring. In this case, whether Rotary International ("International") and the Rotary Club of Duarte ("Duarte") are "business establishments" within the meaning of the Unruh Act is a question of state law. It is a question which has already been resolved in state court, with due consideration to judicial precedent and to the statute's language and legislative history.

Since the court below has explicitly found that both International and Duarte *are* business establishments within the meaning of the Unruh Act and that finding is supported by the evidence, see Section B, *infra*, this Court can and should accept the proposition that the Unruh Act applies to them.

Appellants themselves do not list the applicability of the Unruh Act as one of the "questions presented" in this case. Nevertheless, their brief attempts to distinguish their procedures and objectives from those of other organizations previously considered "business establishments" by this Court and by California courts. This effort at misdirection is contradicted by the evidence, and must be rejected.

B. The Evidence Supports The Lower Court's Finding That International And Duarte Are Business Establishments Under California Law.

Since the Unruh Act was adopted in 1959, its reference to "all business establishments of every kind whatsoever" has consistently been read broadly. *Rotary Club of Duarte v. Board of Directors of Rotary International*, 178 Cal. App. 3d 1035, 1047, 224 Cal. Rptr. 213, 219 (Cal. App. 2 Dist. 1986); *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, 795, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).¹ It has been applied to nonprofit organizations and organizations with "businesslike attributes." *Rotary Club*, 178 Cal. App. 3d at 1049, *citing O'Connor*, 33 Cal. 3d at 796. Its legislative history supports a broad reading, *see Rotary Club*, 178 Cal. App. 3d at 1047; *O'Connor*, 33 Cal. 3d at 796; *Burks v. Poppy Construction Co.*, 57 Cal. 2d 463, 468 (1962), and a similar interpretation has been given to it by the state's highest law enforcement official, the Attorney General of California. 34 Ops. Cal. Atty. Gen. 230 (1959).

¹ Several recent California appellate court decisions illustrate the broad manner in which the term "business establishment" has been construed. For example, in *O'Connor v. Village Green Owners Ass'n*, 33 Cal. 3d 790, a nonprofit homeowners' association was regarded as a business establishment prohibited from discriminating on the basis of age. In *Curran v. Mount Diablo Council of the Boy Scouts*, 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (Cal. App. 2 Dist. 1983), a homosexual excluded from the Boy Scouts stated a cause of action under the Unruh Act because of the Boy Scouts' "businesslike attributes." Similarly, in *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985), the court held the Boys' Club of Santa Cruz is a business establishment under the Unruh Act which cannot exclude girls.

Unruh does not apply, according to the California Supreme Court, to "relationships which are *truly private*." *Rotary Club*, 178 Cal. App. 3d at 1058, citing *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 84 n.14. (Emphasis added.) A "truly private" relationship has been characterized as "continuous, personal and social," taking place "more or less outside public view." *Rotary Club*, 178 Cal. App. 3d at 1058.

Examining International, an organization of clubs rather than individuals, the court below noted that membership "is far from continuous, personal and social," and most of its activities "clearly take place in 'public view.'" *Rotary Club*, 178 Cal. App. 3d at 1058-1059. According to the court, "its businesslike attributes are readily apparent from a brief overview of its organizational structure as well as certain of its administrative and financial concerns." *Id.* at 1051.

Rotary International's organizational structure closely resembles that of a large corporation, with a board of directors, officers, an international staff of 350, and a central office with six separate divisions. It has committees to oversee investments and other financial activity, it reimburses leaders for expenses incurred in furthering Rotary business, and it raises money in part from dues, which are tax deductible. Rotary also sells publications, subscriptions, and advertising, and has developed a license fee and royalty procedure for the use of its emblem. Rotary's regional offices operate as businesses, renting office space and purchasing necessary supplies.

Membership in Rotary Clubs such as Duarte also clearly has commercial significance. The court below compared International's proclaimed policy, which prohibits attempts "to use the privilege of membership for commercial advantage," with the practice of club members, several of whom offered testimony. *Rotary Club*, 178 Cal. App. 3d at 1056. The court's conclusion was that the evidence "leaves no doubt that business concerns are a motivating factor in joining local clubs . . . there are business benefits enjoyed and capitalized upon by Rotarians and their businesses or employers." *Id.* at 1057. These business advantages, the court noted, were not merely incidental. *Id.* at 1058. "By limiting membership in local clubs to business and professional leaders in the community, International has in effect provided a forum which encourages business relations to grow and which enhances the commercial advantages of its members." *Id.*

From the state court's findings that the business advantages Rotarians enjoy are not merely incidental must flow the conclusion that women prohibited from joining clubs are at a disadvantage in the marketplace. Since one of the purposes of the Unruh Act was to prevent precisely such situations, its application here is appropriate and necessary.

C. As A Business Establishment In California, Duarte Was Obligated To Open Its Doors To Women.

Rotary International's operations in Duarte and elsewhere in California have sufficient businesslike attributes to be considered business establishments under the Unruh Act. Moreover, the admission of women would not cause the downfall of Duarte and International, or even seriously interfere with their objectives. *Rotary Club*, 178 Cal. App. 3d at 1060.² Consequently, they cannot discriminate against women, and the permanent injunction against enforcement of the male-only membership restriction must be upheld. Moreover, the Rotary Club of Duarte cannot be expelled from Rotary International for abiding by California's prohibition of discrimination on the basis of sex.

II. International's First Amendment Associational Rights Were Not Abridged By The Striking Down Of International's Male-Only Membership Policy Pursuant To California's Unruh Civil Rights Act.

A finding that International and Duarte are business establishments covered by the Unruh Act requires the Court to consider whether International's first amendment associational rights were abridged by the application of the Act to compel International to modify its rules to accept women as regular members. This Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), established the framework for reviewing claims of deprivations of associational rights. While International argues that the case at bar is distinguishable from *Roberts*, thus requiring a different result, *amicus*

² It is equally clear that the admission of women as regular members will not burden male members' freedom of expressive association in terms of the content of their speech. International is still free to adhere to its agenda of promoting "fellowship in service" for businesspersons and professionals. There is nothing in the record to indicate that female members would attempt to change the basic character of the organization.

disagrees. The associational rights of International and Duarte, like those of the Jaycees, have not been abridged.

In *Roberts*, this Court was confronted with a "conflict between a state's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization." 468 U.S. at 612. The United States Jaycees is a nonprofit national membership service organization with approximately 295,000 members in 7,400 local chapters with 51 state organizations; its sole criteria for full membership were sex and age—it was open only to males between the ages of 18 and 35. The Jaycees challenged the application to them of the Minnesota Human Rights Act which forbade discrimination on the basis of sex in places of public accommodation, requiring them to admit women to local chapters in Minnesota.

Justice Brennan, writing for the majority in *Roberts*, addressed the Jaycees' claim that the application of the Minnesota Human Rights Act to require the acceptance of females as full voting members violated the Jaycees' first amendment associational rights. Justice Brennan stated that the freedom of association encompasses two distinct rights: freedom of intimate association and freedom of expressive association. It is the position of *amicus* that neither component of International's freedom of associational rights was violated.³

A. The Attributes Of International And Duarte Render Them Business Establishments With Limited Rights Of Freedom Of Intimate Association.

In explaining the right of freedom of intimate association in *Roberts*, Justice Brennan noted:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford

³ The Unruh Act has previously been examined in light of freedom of association concerns. In *Pines v. Tomson*, 160 Cal. App. 3d 370, 206 Cal. Rptr. 866, *as modified*, 160 Cal. App. 3d 1086(b) (Cal. App. 2 Dist. 1984), the California Court of Appeal ruled that the publishers of a discriminatory business directory were a business establishment. Applying the *Roberts* test, the court further concluded that the publishers were not deprived of their freedom of associational rights by the application of the Act to them.

the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). (Parallel citations omitted).

468 U.S. at 618.

As an example of the types of relationships entitled to protection, the *Roberts* Court turned to family relationships which

by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.

468 U.S. at 619-20. The Court concluded:

[O]nly relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection.

468 U.S. at 620.

In determining where a particular relationship falls on the continuum from "the most intimate to the most attenuated of personal attachments," *Roberts*, 468 U.S. at 620, the Court noted relevant factors including "size, purpose, policy, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.* The Court expressly declined to identify significant milestones on the vast territory between the ends of the spectrum.

It has already been shown that the lower court in this case relied on the above-cited factors to conclude that International and Duarte are "business establishments" under the Unruh Act. Thus, it logically follows that International's freedom of intimate association is not immune from incursions by the state.

International maintains, *inter alia*, that its selective membership procedures shield it from government intrusion. Appellants, however, provide the Court with an incomplete picture of the selectivity in membership, recruitment policies and the degree of privacy and congeniality maintained at weekly meetings and other functions. Local clubs seek out members who are area businessmen or professionals. Using classified telephone directories and other business directories, each club is mandated to "prepare annually a classifications survey of its locality and compile from such survey a roster of filled and unfilled classifications as the logical basis for building a balanced club membership representing a true and broadly-based cross section of the business and professional life of the locality." Rotary Manual of Procedure, Joint Appendix at 64-65. As such, all businessmen and professionals are welcome. While clubs seek "well-balanced" memberships, with no particular group dominating the ranks, there are no limitations on the representatives from the news media, religious groups and the diplomatic corps.

In addition, clubs are instructed to expand and to recruit new members. Prospective members may attend several meetings before being asked to join.⁴ Students are also invited to attend Rotary functions, even though no student memberships are offered. Contrary to International's assertions, members of the public are invited to attend meetings. In fact, according to the Manual of Procedure, the Board of International recommends that local clubs make a special effort to urge individual members to invite guests to weekly Rotary meetings. Joint Appendix at 39. Also, "[e]mployees, competitors, customers and salesmen are invited by members casually or on special 'days' to the Rotary Club meetings." Joint Appendix at 24. Joint meetings with other service clubs are permitted as are joint service programs. Furthermore, the Board of International explicitly recognizes groups comprised of female relatives of Rotarians organized "for the purpose of having among their objectives the sup-

⁴ Local clubs are encouraged to erect signs in their areas indicating their presence in the community. This is certainly a not-too-subtle method of culling new members.

port of Rotary Club activities." Joint Appendix at 68. Male members and female auxiliary members may also wear Rotary pins on their lapels. *Id.*⁵

By requiring attendance at weekly meetings and allowing Rotarians to attend a club meeting anywhere in the world, International undermines its own arguments about size, selectivity and congeniality. If, in addition to guests and prospective members, out-of-town members attend meetings, local clubs and International rapidly lose those attributes which would compel this Court to provide protection for their freedom of intimate association.⁶

In its attempt to differentiate its attributes from those of the Jaycees, International asserts that its principal purpose is "fellowship in service." As will be explained in more detail *infra*, Rotary's activities and the business benefits flowing from them completely eclipse its stated purpose, making it more of a business entity than a private service organization.

Finally, International seeks protection of its freedom of intimate association by this Court on the grounds that "Rotary's male-only membership is prized both because it enhances the fellowship which is at the heart of Rotary, and because it enables Rotary to operate effectively throughout a world of varied cultures and mores." Brief for Appellant at 22. As to the legitimacy afforded such private discrimination cloaked in the guise of "fellowship," Chief Justice

⁵ The Rotary Manual of Procedure offers the reasons for Rotary acknowledgement of women's auxiliary groups as:

1. appreciation of "the valuable cooperation and participation of women relatives of Rotarians . . . in the community service and other activities of Rotarians and Rotary clubs;"
2. recognition that "women are becoming more and more involved in public service of all kinds;" and
3. awareness of "the interest manifest by women relatives of Rotarians in some communities in associating themselves for the purpose of service work in cooperation with and in support of the service activities of Rotary clubs." Joint Appendix at 68.

⁶ In view of the fact that Rotary International boasts in excess of 19,000 clubs with close to one million members in 157 countries and has an extensive administrative and financial apparatus, its limited freedom of intimate association does not shield it from government regulation.

Burger, in *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1970), stated that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been afforded affirmative Constitutional protections." See also, *United States Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 414, 465 N.Y.S.2d 871, 877 (1983).⁷ Therefore, this argument must fail.

International's plea not to disturb a discriminatory membership policy that works to its advantage outside the United States must also be dismissed. While International is free to fashion whatever rules it wants outside the United States, it cannot call upon this Court to protect those interests which are contrary to United States law. Any attempt to ask this Court to ignore its duties and responsibilities under the Constitution in order to protect a discriminatory policy practiced outside the United States reveals a basic lack of understanding of our judicial system.

Since local clubs are lax in their membership qualifications, invite guests and members of other locals to weekly meetings, encourage recruitment of new members, and allow women auxiliary groups to participate in their activities, they "lack the distinctive characteristics that might afford Constitutional protection to the decision . . . to exclude women." *Roberts*, 468 U.S. at 621.

⁷ The California Court of Appeal in *Curran v. Mount Diablo Council of the Boy Scouts*, responding to the Boy Scouts' claim of abridgement of freedom of association rights, similarly noted that

those with a common interest may associate exclusively with whom they please only if it is the kind of association which was intended to be embraced within the protection afforded by the rights of privacy and free association.

147 Cal. App. 3d 712, 730.

B: The State Of California's Interest In Eradicating Discrimination Is A Compelling One Which Outweighs International's Freedom Of Expressive Association.

International further maintains that bringing it within the purview of the Unruh Act abridges its rights of freedom of expressive association. An examination of the appropriate balancing test yields the conclusion that no such abridgement has occurred.

In *Roberts*, Justice Brennan stated that the individual rights contained in the first amendment

to speak, to worship, and to petition the Government for redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends.

468 U.S. at 622 (citations omitted).

While there is no question that International's right has been implicated, it is equally clear that this right is not absolute and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom." *Roberts*, 468 U.S. at 623 (citations omitted). As noted by the California Court of Appeal in *Pines v. Tomson*, 160 Cal. App. 3d at 392, "California's interest in eradicating discrimination on the basis of . . . sex is unquestionably 'compelling.'" (Citing *Roberts*, 468 U.S. at 623.)

As with the Minnesota statute in *Roberts*, §51 of the Unruh Civil Rights Act was enacted to eliminate all forms of invidious discrimination in places of public accommodation throughout the State of California. "That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. As Chief Justice Bird of the Supreme Court of California stated in *Koire v. Metro Car Wash*, 40 Cal. 3d 24, 34, 707 P.2d 195, 219 Cal. Rptr. 133 (1985), where the court struck down gender-based discounts, "[m]en and women alike

suffer from the stereotypes perpetrated by sex-based differential treatment."⁸

Hoping to avoid the result in *Roberts*, International further attempts to distinguish itself from the Jaycees by arguing that the Jaycees "sold" memberships to the public. However, the reach of *Roberts* cannot be read so narrowly. Justice Brennan stated categorically that "the state interest in assuring equal access [is not] limited to the provision of purely tangible goods and services." *Roberts*, 468 U.S. at 625. An expansive view of the rights of public access "reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." 468 U.S. at 626 (citations omitted). Advantages, facilities, privileges and services protected by the Unruh Act include the development of leadership and management skills and business contacts.

Although International insists that Rotary is a service organization for professionals and businessmen and is not a public commercial organization with incidental associational rights, this is simply not the case. Membership in a local club provides advantages, facilities, privileges, and services such as opportunities to attend business relations conferences where members can learn management techniques to help improve their own business and professional skills. In addition, Rotarians are mandated to instruct their fellow Rotarians about their professions and business practices. As

⁸ Quoting from Kanowitz, *Women and The Law* (1969), p. 4, Chief Justice Bird continued that when the law

emphasizes irrelevant differences between men and women[,] [it] cannot help influencing the content and the tone of the social, as well as the legal, relations between the sexes. . . . As long as organized legal systems, at once the most respected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote. When men and women are prevented from recognizing one another's essential humanity by sexual prejudices, nourished by legal as well as social institutions, society as a whole remains less than it could otherwise become.

40 Cal. 3d at 34-35.

a condition of membership, Rotarians must subscribe to an official Rotary magazine, which contains information and advice relating to business management. Even though Rotarians are precluded from using their Rotary membership for business advantages, exposure to and interaction with other businessmen and professionals can only enhance one's knowledge of the marketplace and contacts in the business community. Moreover, members of local clubs regard Rotary activities as business-related and treat their dues as business deductions. Such business activity is hardly incidental to the stated purpose of Rotary to promote "fellowship in service."

Finally, even if enforcement of the Unruh Act does incidentally abridge International's speech, "that effect is no greater than is necessary to accomplish the state's legitimate purposes." *Roberts*, 468 U.S. at 628. As Justice Brennan further noted,

like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [acts of invidious discrimination in the distribution of publicly available goods, services and other advantages] are entitled to no constitutional protection.

468 U.S. at 628.

III. The Unruh Act Is Neither Vague Nor Overbroad, And Its Constitutionality Should Be Affirmed.

A. Vagueness.

The language, legislative history, and court interpretations of the Unruh Act, taken together, leave no doubt as to what the Act prohibits or to whom it applies. This Court must therefore reject appellants' transparent attempt to evade compliance by asserting that the Act is too vague.

A statute may be considered void for vagueness when it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts*, 468 U.S. at 629, *citing Connally v. General Construction Co.*, 269 U.S. 385 (1925). The *Roberts* case, discussed in detail in Section II, *supra*, included a challenge by the Jaycees to Minnesota's civil rights statute on vagueness grounds. The Court explicitly rejected that challenge, observing that the Minnesota Supreme Court had used a number of "specific and objective criteria" in deciding that the Act reached the Jaycees. *Roberts*, 468 U.S. at 629. These criteria, regarding the or-

ganization's "size, selectivity, commercial nature, and use of public facilities," are the criteria "typically employed in determining the applicability of state and federal anti-discrimination statutes to the membership policies of assertedly private clubs." *Roberts*, 468 U.S. at 629.

The lower Court in the instant case relied on similar criteria in holding the Unruh Act applicable to International and Duarte. See *Rotary Club*, 178 Cal. App. 3d at 1063-1064. Once applicable, the Act's meaning is unmistakable; no guesswork is necessary to understand that women cannot be excluded from the Rotary Club of Duarte.

B. Overbreadth.

Appellants' challenge to the Unruh Act on overbreadth grounds must also fail. On its face and as applied, the Act not only has a plainly legitimate sweep, but also serves a compelling state interest.

Assuming arguendo that the statute could infringe upon certain associational freedoms, such infringement would not suffice to render it unconstitutional. See Section II-B, *supra*. The statute clearly addresses conduct as well as speech, and this Court has stated:

[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that [the statute in question] is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Broadrick v. Oklahoma, 413 U.S. 601, 615-616 (1973).

The statute at issue in *Broadrick*, an Oklahoma statute regulating political activity by state employees, survived a challenge on overbreadth grounds even though its impact on free speech rights was considerably greater than the Unruh Act's impact on first amendment rights in the instant case.⁹ Consequently, as applied to International and Duarte, the Unruh Act is not overbroad.

⁹ In *Brockett v. Spokane Arcades, Inc.*, 105 S. Ct. 2794, 2802 n.12, this Court noted that the *Broadrick* "substantial overbreadth requirement" is applicable even when pure speech rather than conduct is at issue. See also, *New York v. Ferber*, 458 U.S. 747, 772 (1982).

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to affirm the decision below prohibiting Rotary International from discriminating on the basis of sex.

As a civil rights organization devoted to combatting discrimination and seeking justice and fair treatment for all, *amicus* believes the Unruh Civil Rights Act has contributed significantly to achieving equal rights for women and minorities, while respecting the privacy rights of legitimately private clubs. An affirmance would not only serve the interests of justice in this case, but would also underscore the importance of the Act as a major force in eradicating discrimination in the State of California.

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